MESSRS THOMAS, SHANKAR RAM & CO ADVOCATES A

v.

JEFFERY LAW SIEW SU & ORS

HIGH COURT SABAH & SARAWAK, KUCHING B
RHODZARIAH BUJANG JC
[ORIGINATING SUMMONS NO: KG-24-395-2009-II]
10 DECEMBER 2009

LEGAL PROFESSION: *Discharge of solicitors - Conflict of interest - Defendants' application for order to disqualify advocates from appearing as counsel - Whether there was contravention of Advocates (Practice & Etiquette) Rules 1988, r. 28(1) - Whether advocates themselves need to depose affidavits as action concerned matters pertaining to their rights and duties as counsel - Advocates (Practice & Etiquette) Rules 1988, r. 27(1)* C D

The plaintiff was a legal firm comprising of two partners (one Shankar Ram and one Francis Teron Kadap) holding shares in the proportion of 70:30 respectively. They filed this originating summons action for leave to discharge themselves as counsel and enforce their retainer in suit no. 22-133-2009 as well as in two other cases in the Court of Appeal which flow therefrom (Civil Appeal No. Q-02(1M)1818-09 and Q-02(1M)-1817-09. In all three matters, the plaintiff's firm was acting for Jeffrey Law Siew Su, Ng Siew Hong and Mastika Jaya Timber Sdn Bhd who were the defendants in the action herein. The defendants herein had filed a summons in chambers for an order to disqualify both partners from appearing as counsel for their firm citing contravention of r. 28(1) of the Advocates (Practice & Etiquette) Rules 1988 ('the Rules'). The defendants submitted that both the partners had affirmed affidavits containing contentious and disputed facts in this action. Therefore they were potential witnesses who could be cross-examined on their affidavits and must therefore be disqualified from so acting for their firm. E F G

Held (dismissing defendants' application): H

(1) The advocates here, being the only partners in the plaintiff firm, were themselves the *de facto* litigants. The nature of the plaintiff's claim in this case was such that the partners themselves need to depose the affidavits as this action concerned matters pertaining to their rights and duties as counsel in the suit action. (para 8) I

A **(2)** Rule 27(1) of the Rules which says that an advocate shall not appear in any matter in which he is directly pecuniarily interested refers to actions filed by others in which he is so related - not to one where he is sued or being sued in person (or as a partner of a firm in this case). The partners had
B elected to conduct their own case and were not meddling with the duties of an appointed counsel. (paras 8 & 11)

Case(s) referred to:
Karpal Singh v. Atip Ali [1986] 2 CLJ 419; [1986] CLJ (Rep) 168 SC ***(refd)***
Karpal Singh v. Lim Boo Chang [1989] 2 CLJ 106; [1989] 1 CLJ (Rep) 53
C *SC* ***(refd)***
Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1985] 1 CLJ 181; [1985] CLJ (Rep) 575 HC ***(refd)***
Paruvathy Palany v. Sathiasealan Govindasamy [1999] 6 CLJ 113 HC ***(refd)***
Reed v. Gray [1952] 1 All ER 241 ***(refd)***
T Venkanna v. The Hon'ble High Court of Mysore AIR 1973 Mysore 127 ***(refd)***
D *TO Thomas v. KCI Reddy & Anor [1974] 1 LNS 163 FC* ***(refd)***

Legislation referred to:
Advocates (Practice & Etiquette) Rules 1988, rr. 27(1), (2), 28(1)
Advocates Ordinance Sarawak (Cap 110), ss. 8, 16(1), (2)
Legal Profession (Practice & Etiquette) Rules 1978, r. 28(a)

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For the plaintiff - Shankar Ram; M/s Thomas, Shankar Ram & Co Advocates
For the defendants - Lim Heng Choo; M/s Lim & Lim Advocates
Anthony Tai; M/s Anthony Tai Advocates

Reported by Suhainah Wahiduddin

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JUDGMENT

Rhodzariah Bujang JC:

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[1] The plaintiff is a legal firm comprising of two partners holding shares in the proportion of 70:30. Mr. Shankar Ram holds the majority shares and Mr. Francis Teron Kadap the other remaining shares. They have filed this originating summons action for leave to discharge themselves as counsels and enforce their
H retainer in Suit No. 22-133-2009-I as well as in two other cases in the Court of Appeal which flow therefrom (Civil Appeal No. Q-02(1M)1818-09 and Q-02(1M)-1817-09). In all three matters, the plaintiff's firm was acting for Jeffrey Law Siew Su, Ng Siew Hong and Mastika Jaya Timber Sdn Bhd who are the defendants in this
I action before me. The defendants herein have filed a Summons in Chambers for an order to disqualify both Mr. Thomas Shankar Ram

and Mr. Francis Teron Kadap from appearing as counsel for their firm citing contravention of r. 28(1) of the Advocates (Practice & Etiquette) Rules 1988.

Rule 28(1) provides as follows:

> An advocate shall not appear in court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardizing his client's interests.

[2] In the affidavit in support of Mr. Anthony Tai, a senior advocate who appeared for the defendants, it was deposed that both Mr. Shankar Ram and Mr. Francis Teron had affirmed affidavits containing contentious and disputed facts in this action before me. Therefore, they are potential witnesses who would be cross-examined on their affidavits and must therefore be disqualified from so acting for their firm.

[3] In support of their argument, Mr. Anthony Tai and Mr. Lim Heng Choo in their joint submission referred to the cases of, *inter alia Paruvathy Palany v. Sathiasealan Govindasamy* [1999] 6 CLJ 113 and *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* [1985] 1 CLJ 181; [1985] CLJ (Rep) 575 where the courts have pronounced that a solicitor who deposed contentious affidavits in a case are liable to be cross-examined and should not therefore be allowed to continue acting for their client in the said case.

[4] Mr. Shankar Ram's counter argument is to refer to another rule ie, r. 27(1) and submitted that although r. 27(1) provides that an advocate shall not appear in any matter in which he is directly pecuniarily interested nevertheless sub-r. (2) thereof gives an exception in the case of an advocate who appears himself to tax his own costs. He also submitted that to interpret r. 28(1) to mean that any advocate cannot appear for himself in his own case would lead to absurdity because even a lay person without any legal training is permitted to appear in person for his own case.

[5] In his submission in reply, Mr. Shankar Ram referred to s. 16(2) of the Advocates Ordinance Sarawak (Cap 110) which he said also supports their argument of the right to appear in person. I must say that I am not persuaded that this s. 16(2) has any relevance to the issue at hand for it must be read with s. 8 (which provides for the exclusive right of an advocate to practice in Sarawak) and s. 16(1), the penalty which awaits a person who is not

an advocate but performs the function of one. Section 16(2) therefore says that despite these two provisions, a litigant can still appear in person. In this connection, I think that the two Rules Mr. Shankar Ram had earlier cited are worth considering, and I would do so presently.

A Conflict Of Interest

[6] There is wisdom in the words of the legislature in enacting r. 28(1) or its equivalent in r. 28(a) of the Legal Profession (Practice & Etiquette) Rules 1978. It is so that an advocate representing his client can rise above the factual disputes and vested interests of his clients in the case, to fight his legal battles without subjecting himself to being ridiculed in the witness stand. Above all, it is so that his aloofness from the factual disputes will not cloud his mind and he is able to represent the interest of his client and discharge his duty not just to him but to the court (for he is also an officer of the court), fairly. The cases cited by Mr. Anthony Tai and Mr. Lim Heng Choo bore testimony to this wisdom and to the same principle applicable in USA and in Canada.

[7] Yet, there is a distinguishing feature in the cases cited by them which is so apparent in this case - it is that the advocates here, being the only partners in the plaintiff firm, are themselves the *de facto* litigants unlike in the cited cases where they were acting for the litigants.

[8] The nature of the plaintiff's claim in this case is such that the partners themselves need to depose the affidavits as this action concerns matters pertaining to their rights and duties as counsel in the suit action and the related appeals and the analogy drawn by Mr. Shankar Ram with respect to a lay person acting for himself is, in my view, appropriately made. However, after some consideration I am of the view that r. 27(2) cited by Mr. Shankar Ram is not applicable to their case - that Rule is specifically meant for a taxation proceeding where an advocate has presented his bill of cost to be taxed by the court and is not meant to cover just any case where cost is an issue or a subject matter of dispute. However, I am certain that r. 27(1) which says that an advocate shall not appear in any matter in which he is directly pecuniarily interested refers to actions filed by others in which he is so related - not to one where he is sued or being sued in person (or as a partner of a firm as in this case). Similarly with r. 28(1). It is also to prevent an advocate to act or to continue acting for his client if he knows that his possession of material and disputed facts is such that it will make him a potential witness in the case.

[9] Mr. Shankar Ram has cited a number of reported cases where an advocate appeared to conduct the prosecution of their own claims in court and these cases are:

(i) *TO Thomas v. KCI Reddy & Anor* [1974] 1 LNS 163.

(ii) *Karpal Singh v. Atip Ali* [1986] 2 CLJ 419; [1986] CLJ (Rep) 168.

(iii) *Karpal Singh v. Lim Boo Chang* [1989] 2 CLJ 106; [1989] 1 CLJ (Rep) 53.

[10] The above cases were all fought in the Federal Court and the Supreme Court. Another case precedent also cited was *Reed v. Gray* [1952] 1 All ER 241 where a solicitor sued for specific performance and represented himself in the action.

[11] I am therefore confident from these case precedents which have been brought to my attention and from being able to distinguish the ones cited to me by defendants' counsel that the decision I made above is not ground breaking and have the backing of the leeway given by more eminent courts than mine. It would be amiss of me not to mention also that Mr. Lim Heng Choo and Mr. Anthony Tai in their submission in reply has drawn my attention to the passage in the case of *T Venkanna v. The Hon'ble High Court of Mysore* AIR 1973 Mysore 127 where a quotation from the book by Merchant "Barrister-at-law" was made. The learned author at p. 41 said:

> Barristers cannot be heard in court as advocates unless they are robed.
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> and at page 70 thereof he said:
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> Barrister who is a litigant cannot appear both as counsel and as litigant and that he must elect either to conduct the case entirely as litigant in person or to abandon the case entirely to his counsel. …
>
> and
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> ... he cannot be heard to address the Court either after or before his counsel.

It is clear in this case that Mr. Shankar Ram and Mr. Francis Teron had elected to conduct their own case and were not meddling with the duties of an appointed counsel. When appearing in person and if this case goes to open court, the advice given in the cited case is that Mr. Shankar Ram and Mr. Francis Teron must not be robed.

[12] Before I conclude, I feel compelled myself to give a word of advice and it is this. To prevent further dispute on the same issue and for sake of clarity of the positions of Mr. Shankar Ram and Mr. Francis Teron, it would be best if the plaintiff's name be amended to that of the partners themselves but suing as a firm or if that advice is not taken, then to engage another advocate to appear for them because though legally there is nothing to preclude them from appearing in persons, I am reminded of a quotation with this sage advice:

> A lawyer who acts for himself has a fool for a client.

[13] However, on the legal considerations I gave earlier, I dismiss the application of the defendants with cost to be taxed unless agreed. If not agreed, getting-up is capped at RM4,000.